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## QUESTIONS PRESENTED

### I.

Whether the Double Jeopardy Clause which prohibits the state from subjecting a defendant to successive capital sentencing proceedings should apply to successive non-capital sentence enhancement proceedings.

### II.

Whether this Court's decision in Bullington v. Missouri, 451 U.S. 430 (1981) extends the protection afforded by the Double Jeopardy Clause contrary to the original intent of the clause as articulated by the terms of the Constitution and beyond the traditional protection of the clause.

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## INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association is a national association of appointed counsel in both capital and non-capital criminal cases and civil legal aid corporation attorneys who represent indigent persons in the federal and state courts.

The National Association of Criminal Defense Lawyers is a national association of retained and appointed counsel representing defendants in state and federal court in both capital and non-capital cases. NLADA and NACDL members regularly litigate double jeopardy issues in the trial courts of the United States and the various states.

## STATEMENT OF THE CASE

Missouri law requires the state to prove its persistent offender allegations outside the presence of the jury, but



during the jury trial. The record is completely silent as to whether such a hearing occurred in respondent's case. Despite the petitioner's failure to use this window of opportunity, the trial court found respondent to be a persistent offender and removed the sentencing function from the jury.

On appeal, the Missouri Court of Appeals "requested the parties to supplement the record to prove that the prior convictions were presented to the court. No such proof was furnished." State v. Bohlen, 670 S.W.2d 119, 123 (Mo. App. 1984).

Petitioner asks this Court to authorize repeated attempts to prove that Mr. Bohlen is a persistent offender, despite having had several opportunities to prove its charge.

The Eighth Circuit Court of Appeals

granted respondent habeas corpus relief barring petitioner from pursuing its persistent offender allegations. The court, in Bohlen v. Caspari, 979 F.2d 109, 113 (8th Cir. 1992) held that after

Bullington [v. Missouri], 451 U.S. 430 (1981)], it is a short step to apply the same double jeopardy protection to a non-capital sentencing hearing as the Supreme Court applied to a capital sentence enhancement hearing. The rule is not new.

The court held that retrial of respondent was barred by Burks v. United States, 347 U.S. 1 (1978), because the reversal by the Missouri Court of Appeals was based on insufficiency of the evidence.

#### ARGUMENT

I.

A.

A federal court cannot reach the merits or grant habeas corpus relief to a state prisoner if the rule to be applied is

new<sup>1</sup> within the meaning of Teague v. Lane, 489 U.S. 288 (1989).<sup>2</sup>

The Court of Appeals carefully conducted a new rule analysis and held that:

[e]xtending Bullington to non-capital sentencing enhancement hearings is not a sufficient stretch to cause it to be a new rule under Teague. Bohlen v. Caspari, 979 F.2d 109, 115 (8th Cir. 1992).

Amici agree with the analysis set out by the Eighth Circuit and can see no reason for repeating that analysis here. However, Teague and its progeny have recognized two exceptions to the non-retroactivity doctrine during habeas review. If this

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<sup>1</sup>Hartman, To Be or Not to Be a New Rule: The Non-Retroactivity of Newly Recognized Constitutional Rights After Conviction, 29 Cal. W.L.R. 53, 57-58 (1992).

<sup>2</sup>See also, Penry v. Lynaugh, 492 U.S. 302 (1989), Butler v. McKellar, 494 U.S. 407 (1990).

Court finds respondent to be the beneficiary of a new rule, both exceptions are applicable to the Eighth Circuit holding.

B.

#### FIRST EXCEPTION TO TEAGUE

If it is a new rule to apply the Double Jeopardy Clause to certain fact-finding, during a non-capital sentencing, where the state has previously offered insufficient evidence, the rule is encompassed by the first exception to the collateral review, non-retroactivity doctrine.

"The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, see (cite omitted), or addresses a "substantive categorical guarante[e] accorded by the Constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense." Graham v.

Collins, U.S. 113  
S.Ct. 892, 903 (1993) (cites  
omitted).

The rule applied by the Eighth Circuit addresses the application of the Double Jeopardy Clause (a substantive categorical guarantee accorded by the Constitution) which prohibits determination of persistent offender status (a certain category of punishment) for defendants, where at a first hearing the state failed to produce sufficient evidence to persuade the fact-finder of respondent's persistent offender status (class of defendants because of their status). In summary, application of the Double Jeopardy Clause would make respondent ineligible for persistent offender status.

In Penry, at 329-330, the Court identified two examples of the application of the first exception to the Teague rule. The Penry Court cited Coker v. Georgia, 433

U.S. 584 (1977). The Court in Coker held that the Eighth Amendment (a substantive categorical guarantee accorded by the Constitution) prohibits imposition of the death penalty (a certain category of punishment) for the rape of an adult woman (class of defendants based on their status or offense). Coker is similar to respondent's situation because the rule in Coker did not foreclose the state from imposing punishment on Coker, it merely foreclosed application of a specific penalty determined by his offense.

Likewise, the Court's second example, Ford v. Wainwright, 477 U.S. 399 (1986), held that the Eighth Amendment (a substantive categorical guarantee accorded by the Constitution) prohibited carrying out the death sentence (a certain category of punishment) against death row inmates who were presently incompetent to be



executed (class of defendants based on their status or offense). Ford also did not foreclose punishment. Ford is similar to respondent's situation because both prevent imposition of a specific punishment on a class of offenders based on their status.

The first exception to Teague's retroactivity holding applies. The Court of Appeals properly reached the substantive double jeopardy issue presented by respondent's application for a writ of habeas corpus.

C.

SECOND EXCEPTION TO TEAGUE

At first blush, the policies underlying the Double Jeopardy Clause do not appear to support the values of accuracy and reliability which undergird the second exception to Teague.

Under the second exception, a new

rule may be applied on collateral review "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" Butler v. McKellar, at 416.

This test has been supplemented by a requirement that the new rule "not seriously diminish the likelihood of obtaining an accurate determination...." Butler at 357. The Double Jeopardy Clause has always been considered a bedrock procedural protection implicit in the concept of ordered liberty. Robinson v. Neil, 409 U.S. 505 (1973). However, the procedural protection of the Double Jeopardy Clause is generally not designed to foster accuracy. The Clause enforces finality concerns. However, in one clear way, application of the Double Jeopardy Clause directly impacts accuracy and reliability. By barring repeated attempts to prove an allegation, the Double Jeopardy

Clause motivates the prosecution to treat the first hearing as the main event. United States v. Scott, 437 U.S. 82, 106-108 (1978). The state is required to gather and present all of its evidence. The Double Jeopardy Clause provides a strong incentive for a reliable first determination of the state's accusation, since the state is not permitted a "second bite at the apple." Burks v. United States, 437 U.S. 1, 17 (1978).

In Benton v. Maryland, 395 U.S. 784, 794 (1969), this Court held that;

the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.

This holding was held fully retroactive.

Ashe v. Swenson, 397 U.S. 436 (1970).

Further, in Robinson v. Neil, supra., now Chief Justice Rehnquist, writing for a

unanimous Court, held the double jeopardy holding in Waller v. Florida, 397 U.S. 387 (1970), fully retroactive. The Court in Robinson stated that the

guarantee against double jeopardy is significantly different from procedural guarantees [which have been] held . . . to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial. Id. at 509.

The rule that the Double Jeopardy Clause bars relitigation of the status of being a persistent offender in Missouri once the state has failed to adduce sufficient evidence, is parallel to the rule in Robinson. In Robinson, at 509-510, the Court pointed out that in

Furman v. Georgia, [408 U.S. 238 (1972)], our mandate was tailored so as to deny to the State only the authority to impose a punishment that we held

unconstitutional, without the necessity of a redetermination of the factual question of whether the offense had in fact been committed. Thus, the prejudice to the State resulting from the necessity of an entirely new trial because of procedures newly found to be constitutionally defective, with the attendant difficulties of again rounding up witnesses whose memories would of necessity be dimmer for the second trial than for the first, was not present. That which was constitutionally invalid could be isolated and excised without requiring the State to begin the entire fact finding process anew.

In fact, the Double Jeopardy Clause forbids relitigating the persistent offender status of respondent altogether.

One of the strongest considerations in determining whether a particular rule should be considered under the second exception is whether it is fundamental to our concept of ordered liberty. This Court has consistently held under the various theories of retroactivity that double jeopardy holdings are fully retroactive.

There is simply no reason to view this double jeopardy question differently.

The second exception to Teague's non-retroactivity holding applies. The Eighth Circuit Court of Appeals properly reached the substantive double jeopardy issue presented by respondent's application for a writ of habeas corpus.

## II.

The Fifth Amendment to the Constitution of the United States provides in part "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution. Breed v. Jones, 421 U.S. 519, 528 (1975).

Is allowing the state repeated opportunities to try to prove its claim that respondent is eligible for treatment

as a persistent offender putting respondent "in jeopardy?" The Court of Appeals answered this question in the affirmative. After the state has had one full and fair opportunity to prove its own allegations, a defendant acquires an interest in finality protected by the Double Jeopardy Clause.

Burks, supra., held that the Double Jeopardy Clause forbids a retrial after an acquittal, whether the acquittal is a decision by the original fact-finder or an appellate reversal for insufficiency of the evidence.

The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. (footnote omitted) This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State... to make repeated attempts to convict an individual for an alleged offense," since [t]he constitutional prohibition

against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." Burks, at 11. (cites omitted).

Mr. Bohlen has run the persistent offender gauntlet.<sup>3</sup> The trial court's discretion was sufficiently channeled. Mo. Rev. Stat. §559.021.1 gave the court one of two options, 1) finding respondent a persistent offender or 2) finding that the state had failed to prove the persistent offender charge. Further, respondent endured a trial-like process. Missouri's persistent offender statutes, as crafted by that state's legislature, requires that the

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<sup>3</sup>"As we have explained on numerous occasions, the bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissably enhanced sentence." Ohio v. Johnson, 467 U.S. 493, 498-9 (1984) (emphasis added).



court find a defendant to be a persistent offender if the state proves all of the essential elements of the persistent offender charge beyond a reasonable doubt. Mo. Rev. Stat. §559.021.2.<sup>4</sup> The court is required to make findings of fact, Mo. Rev. Stat. §559.021.1(3), and the defendant is accorded full rights of confrontation and cross-examination with the opportunity to present evidence. Mo. Rev. Stat. §559.021.4. Finally, respondent has endured the embarrassment, insecurity, anxiety and expense of defending against being classified, stigmatized and further

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<sup>4</sup>Missouri's use of the beyond a reasonable doubt standard indicates that the interests of the accused are "of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgement." Addington v. Texas, 441 U.S. 418, 423-424 (1979). This standard evinces the legislature's determination that the entire risk of non-persuasion (and nonproduction) rests on the State.

punished under the Missouri statutory scheme.

An acquittal is accorded special weight. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" See Fong Foo v. United States, 369 US 141, 143 [(1962)]." United States v. DiFrancesco, 449 U.S. 117, 129 (1980).

It is the state's failure to persuade, not the defendant's innocence that triggers the double jeopardy bar.

The petitioner's persistent failure to offer evidence in support of its allegation and a routine application of Burks would result in barring further proceedings on the habitual offender allegation based on insufficiency of the evidence. See also, Hudson v. Louisiana, 450 U.S. 40 (1981).



The question presented here is whether the Missouri legislature intended its persistent offender proceeding to be final for double jeopardy purposes. Missouri v. Hunter, 459 U.S. 359 (1983).<sup>5</sup> The procedural protections established by Missouri's legislature raise a powerful presumption that the Double Jeopardy Clause applies to persistent offender proceedings.

In Tibbs v. Florida, 457 U.S. 31, 45

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<sup>5</sup>Amici acknowledges that this articulation of the issue highlights the tension created by a specific provision of the Bill of Rights being interpreted as a tool for divining legislative intent, rather than as a substantive limitation. McKay, Double Jeopardy: Are the Pieces the Puzzle?, 23 Washburn L.J. 1, 2-6 (1983); Patterson, Missouri v. Hunter and the Legislature: Double Punishment without Double Jeopardy, 37 Ark. L. Rev. 1000, 1012 (1984) ("[T]he decision, [Hunter], does appear to render the double jeopardy clause simply inapplicable to the legislature in the area of substantive multiple punishment."). This case does not require resolving this tension, because Missouri's treatment of its persistent offender procedures is consistent with finding the Double Jeopardy Clause applicable.

n. 22 (1982) this Court suggested that a legislature could change the rules in response to an extension of double jeopardy protections to reweighing decisions. There are constitutional limitations on the legislative prerogative concerning recidivist provisions.<sup>6</sup>

Specht v. Patterson, 386 U.S. 605 (1967) involved a Colorado statute which authorized involuntary confinement from one day to life for certain sex offenders. The Colorado procedure had the effect of increasing the amount of the confinement the defendant was eligible for and attached an additional stigmatizing label to the defendant. This Court held,

[d]ue process, in other words, requires that he be present with

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<sup>6</sup>In Mullaney v. Wilbur, 421 U.S. 684 (1975), this Court held that an element of the crime of murder cannot be shifted to the defendant through the subterfuge of relabeling.

counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." Id. at 610.

Missouri's persistent offender statute similarly results in exposing defendants to increased punishment and a stigmatizing label.

### III.

This Court has applied Burks' acquittal rationale to sentencing several times in the death penalty context. The government is barred from repeatedly exposing an offender to the risk of a death penalty after the state has offered insufficient evidence at its first full and fair opportunity to convince the sentencer that death is the appropriate punishment. Bullington v. Missouri, *supra* (jury sentencing); Arizona v. Rumsey, 467 U.S.

203 (1984) (judge sentencing). In Bullington, this Court recognized the legitimate finality concerns which are triggered by the prosecution's failure to persuade the jury of the appropriateness of death.

In contrast to Burks' acquittal-based holding, this Court in Tibbs v. Florida, *supra.*, turned back a double jeopardy claim when a Florida appellate court reweighed evidence and reversed a conviction. It was a straight forward application of the "sufficiency/trial error" distinction.<sup>7</sup> When the sentencer is persuaded by the state's evidence in the first hearing to

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<sup>7</sup>Lower courts understand this distinction. For example, in Tate v. Armontrout, 914 F.2d 1022, 1026-7 (8th Cir. 1990) the court noted that "Tate's was not a case of the state getting a second chance to prove something it had failed to prove the first time, the heart of double jeopardy's bar. See, Burks, at 11. Rather, it was Tate who got a chance to attack the state's evidence."

impose a death sentence, an effort to reimpose the death penalty is permitted if the intervening reversal is for trial error, rather than for insufficiency of the evidence. Poland v. Arizona, 476 U.S. 147 (1986).

Respondent comes clearly under the Burks acquittal rule. Unless this Court reaches out<sup>8</sup> to overrule Bullington and Rumsey, Bohlen v. Caspari, was correctly decided and the judgement should be affirmed. Amici reluctantly addresses the

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<sup>8</sup>See Simpson v. United States, 435 U.S. 6, 11-12 (1978). "Before an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged." (Emphasis supplied).

vitality of Bullington and Rumsey.<sup>9</sup>

IV.

Bullington, at 446, held that

[h]aving received "one fair opportunity to offer whatever proof it could assemble," Burks v. United States, at 16, the State is not entitled to another.

In assessing whether the State had its fair opportunity to prove that death was the appropriate penalty, the Court focused on three traditional measures of double jeopardy application.<sup>10</sup> First, the Court pointed out that

Missouri law provides two, and only two, possible sentences for

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<sup>9</sup>"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification...." There is not a sufficient reason to warrant the Court in "taking the exceptional action of overruling Bullington." Rumsey at 212.

<sup>10</sup>Applying the same test announced in Bullington, respondent's appellate acquittal is entitled to double jeopardy protection.

a defendant convicted of capital murder . . . . [And,] the Missouri statutes contain substantive standards to guide the discretion of the sentencer. Bullington at 432-433.

Second, the court focused on the Missouri statutes which "also afford procedural safeguards to the convicted defendant."<sup>11</sup> Id., at 433. Finally, the court acknowledged that the

"embarrassment, expense and ordeal" and the "anxiety and insecurity" faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. Id., at 445.

Ultimately, the court pointed out that

[b]y enacting a capital sentencing procedure that

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<sup>11</sup>As this Court noted in Specht at 610 "[t]he case is not unlike those under recidivist statutes where an habitual criminal issue is a 'distinct issue.' (Graham v. West Virginia, 224 U.S. 616, 625 (1912), on which a defendant 'must receive reasonable notice and an opportunity to be heard.' (cite omitted)).

resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.' Id., at 444.

Examination of the factor of nondiscretionary decision making distinguishes Bullington from DiFrancesco v. United States, supra.. In DiFrancesco, the United States sought to appeal, "claiming that the District Court abused its discretion in imposing" the sentence it did. Id., at 125. There was simply no occasion to address the double jeopardy implications of a government appeal from its own failure to prove the defendant's status as a special dangerous offender. Until Bullington, none of the Court's previous cases, addressing double jeopardy implications at sentencing, involved proceedings which had the hallmarks of a



criminal trial.<sup>12</sup> Thus, double jeopardy protections were not triggered.

The existence of specific procedural protections is the same test that was used by the majority recently in Dixon v. United States, \_\_\_ U.S. \_\_\_, 113 S.Ct. 2849 (1993). The Court held that the Double Jeopardy Clause applies to criminal nonsummary contempt proceedings.

We have held that constitutional protections for criminal defendants other than the double jeopardy provision apply in nonsummary criminal contempt prosecutions just as they do in other criminal prosecutions. See, e.g., Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 444 (1911) (presumption of innocence, proof beyond a reasonable doubt, and guarantee against self-incrimination); Cooke v. United States, 267 U.S. 517, 537 (1925) (notice of charges, assistance of counsel, and right to present a

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<sup>12</sup>United States v. DiFrancesco, supra.; Chaffin v. Stynchcombe, 412 U.S. 17 (1973); North Carolina v. Pearce, 395 U.S. 711 (1969); Stroud v. United States, 251 U.S. 15 (1919).

defense); In re Oliver, 333 U.S. 257, 278 (1948) (public trial). We think it obvious, and today hold, that the protection of the Double Jeopardy Clause likewise attaches. (cites omitted). Dixon v. United States, \_\_\_ U.S. \_\_\_, 113 S.Ct. 2849, 2856 (1993).

Status as a recidivist can have dramatic consequences. Solem v. Helm, 463 U.S. 277 (1983) (life without parole for recidivist violates Eighth Amendment under circumstances of case); Rummel v. Estelle, 445 U.S. 263 (1980) (life sentence for recidivist does not violate Eighth Amendment). Confronted with a never ending series of opportunities for the state to attempt to enhance a sentence, a defendant must prepare to defend himself over and over again. Such uncertainty interferes with correctional classification and programming. A defendant facing repeated efforts by the state to muster sufficient evidence suffers "anxiety and insecurity,



embarrassment, expense and ordeal," Bullington, at 445. Missouri's persistent offender statutes offer a nondiscretionary, either/or choice, confined by strict procedures which subjects an offender to stress and anxiety.

Finally, petitioner provides a shockingly inequitable case for another crack at respondent. Petitioner did not bother to offer evidence when Missouri law required it. When the Missouri Court of Appeals ordered the record supplemented, petitioner did nothing.<sup>13</sup> There was no need for respondent to ask for a clean slate on appeal. To this day, petitioner has not even attempted to justify such nonfeasance.

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<sup>13</sup>Of course, respondent cannot claim that petitioner used its first two opportunities to "rehearse" its trial strategy.

## CONCLUSION

Amici respectfully urges this Court to affirm the continuing vitality of Bullington and Rumsey. Amici respectfully urges this Court to affirm the applicability of the Double Jeopardy Clause to trial-like determinations of status, including the insufficiency based acquittal rule. Finally, amici respectfully urges this Court to affirm that these rules are fully retroactive. The Eighth Circuit Court of Appeals should be affirmed in all respects.

RESPECTFULLY SUBMITTED

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